85-2078

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1985

MARTIN G. THUNA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the District Court, by dictating the redacted testimony of FBI Agent William Stovall, without even reliably ascertaining in advance what his testimony was to be, and despite the absence of a *Bruton* problem, unreasonably prejudiced the defense of Martin Thuna.

2. Whether or not the District Court erred in admitting the "J. Rodriguez, Inc." invoices as rebuttal evidence, and thereby opened the door to unfair surprise testimony of an alleged cover-up, in violation of the requirement of advance disclosure of the evidence to the defense, as mandated by Rule 16 of the Federal Rules of Criminal Procedure.

3. Whether or not the District Court erred in admitting as rebuttal the testimony of Dennis Bolton.

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Abbreviations Used in the Text

The abbreviation "RT" stands for the Reporter's Transcript of proceedings. Thus, for example, "RT 10:7-12 (3/6/85)" refers to the excerpt at page 10, lines 7-12, of the Reporter's Transcript of the proceedings of March 6, 1985 in the District Court below.

The "Appendix" is the 607-page appendix, or excerpt of the record, which was filed with the brief of the appellant Martin Thuna in the Court of Appeals below.

No. _____

IN THE
SUPREME COURT
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MARTIN G. THUNA,

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Martin G. Thuna, respectfully petitions this Court to issue its Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit, which opinion affirms the judgment of conviction in the United States District Court in this case. The opinion of the Court of Appeals was issued March 18, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, dated March 18, 1986, is set forth in full in Appendix A hereto.

A petition for rehearing en banc, on behalf of the petitioner Martin G. Thuna, was submitted in this case in timely fashion to the Court of Appeals. That petition for rehearing was denied by order filed April 18, 1986. A copy of that order is attached hereto as Exhibit B. Accordingly, by Rule 20.4 of the Supreme Court Rules, the instant petition for a writ of certiorari is timely.

JURISDICTION

The jurisdiction of this Court upon this petition for writ of certiorari is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI (including right of defendant to confront adverse witnesses): The complete text of the Sixth Amendment is set forth in Appendix C hereto.

Title 18, United States Code, Section 659 (regarding, *inter alia*, unlawful possession of goods stolen from interstate commerce, knowing them to have been stolen): The complete text of this statutory provision is set forth in Appendix C hereto.

Title 18, United States Code, Section 2314 (regarding, *inter alia*, unlawful transportation of goods in interstate commerce, knowing them to have been stolen): The complete text of this statutory provision is set forth in Appendix C hereto.

Title 18, United States Code, Section 371 (regarding conspiracy): The complete text of this statutory provision is set forth in Appendix C hereto.

Title 18, United States Code, Section 2 (regarding aiding and abetting, or causing an act to be done): The complete text of this statutory provision is set forth in Appendix C hereto.

Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure:

> **(C) Documents and Tangible Objects.** Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 106 of the Federal Rules of Evidence:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded

statement which ought in fairness to be considered contemporaneously with it.

Rule 403 of the Federal Rules of Evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On April 11, 1984, there was returned an Indictment charging two counts against the petitioner Martin G. Thuna and two codefendants Juan Ortiz-Negron and Alfonso Rivera-Mercado. All defendants were arraigned on April 18, 1984 and entered pleas of not guilty.

On September 26, 1984 there was returned a Superseding Indictment, in four counts, charging, in Count One, all defendants, with conspiracy to unlawfully possess goods of a value in excess of $100.00, stolen from interstate commerce, knowing them to have been stolen (in violation of 18 U.S.C. Sec. 371 and 659); in Count Two, all defendants, with unlawful possession of goods of a value in excess of $100.00, stolen from interstate commerce, knowing them to have been stolen, and aiding and abetting such possession (in violation of 18 U.S.C. Sec. 2 and 659); in Count Three, the defendants Thuna and Ortiz-Negron, with conspiracy to unlawfully transport in interstate commerce goods of a value in excess of $5,000.00, knowing them to have been stolen (in violation of 18 U.S.C. Sec. 371 and 2314); and in Count Four, the defendants Thuna and Ortiz-Negron, with unlawful transportation in interstate commerce of goods of a value in excess of $5,000.00, knowing them to have been stolen, and aiding and abetting such possession (in violation of 18 U.S.C. Sec. 2 and 2314).

Martin Thuna was arraigned on the charges in the Superseding Indictment on October 18, 1984, following the arraignment of his codefendants thereon October 4, 1984. All defendants entered pleas of not guilty on all counts.

The District Court below properly exercised jurisdiction of this case pursuant to 18 U.S.C. Sec. 3231, in conjunction with the statutes referenced in the paragraph immediately above, cited in the Superseding Indictment.

A ten-day jury trial as to all of the defendants began on March 11, 1985, and concluded March 25, 1985, in the Courtroom of the Honorable Jaime Pieras, Jr., United States District Court Judge. At the close of the Government's case, all of the defendants presented motions for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. In response thereto, the District Court granted judgment of acquittal of defendant Martin Thuna as to Count One and Count Three, while the defendant Juan Ortiz-Negron was acquitted on all counts, and Alfonso Rivera-Mercado was acquitted on Count One. On March 25, 1985, at the close of all the evidence, the defendants Martin Thuna and Rivera-Mercado moved for acquittal, under Fed.R.Crim.P. Rule 29, and Rivera-Mercado moved for a mistrial. All such motions were denied. On the same date, the jury returned a verdict of acquittal as to Rivera-Mercado. At the same time, the petitioner, Martin Thuna, was found guilty on Count Two and Count Four, and immediately committed to custody. His bail pending sentencing was set at $1,000,000.00 cash. On March 27, 1985, a bail hearing was held and the District Court, by order of April 2, 1985, ordered Martin Thuna held without bail. On May 20, 1985, the District Court sentenced Martin Thuna to a term of imprisonment of eight (8) years on each of Count Two and Count Four, those terms to run concurrently. In addition, the District Court fined the petitioner $5,000.00 on Count Two and $10,000.00 on Count Four, with the proviso that the petitioner remain

in custody until such time as the fines were paid or he was otherwise discharged by due course of law. The Judgment and Commitment Order setting forth this sentence is dated, and was filed, May 20, 1985. The petitioner is presently incarcerated in a federal correctional institute in Puerto Rico.

The petitioner's Notice of Appeal from the final judgment in the District Court below was filed May 22, 1985.

Martin Thuna, at the time of trial, was a California resident, and the President of Farmedics, Inc., a California corporation engaged in the wholesale distribution of pharmaceuticals, health and beauty aids, and various items regularly sold in drug stores. He was also President of three corporations in Puerto Rico, includng the corporations known as Drogueria Save-On Drugs, Inc., and Drogueria Isla, Inc. Farmedics bought its merchandise through spot purchases when products were being offered by manufacturers or middleman at substantial discount. And merchandise purchased in one area was normally shipped to another locality, where it could be sold at a profit. To be successful, it was necessary for Farmedics to purchase its merchandise at a sufficiently low price so that, after the payment of transportation and storage costs and other overhead, there was still a margin or differential between cost and selling price. And in order to keep costs under control, it was necessary, as a practical matter, for Farmedics to transport and sell its merchandise without delay.

At the trial below, several government witnesses experienced in business and who had traded with Farmedics testified that the said method of doing business (purchasing highly discounted merchandise in spot trades in one area for resale at a profit in another) is a recognized and legitimate mode of wholesale distribution. *See United States v. Weinstein*, 762 F.2d 1522, 1527 (11th Cir. 1985).

Because of an abundance of pharmaceutical manufacturing plants in Puerto Rico, pharmaceutical merchandise is readily available there at substantial discounts under the prices prevailing in the fifty states. This situation is due in large part to the policies of a Puerto Rican government agency known as the "Departamento de Asuntos Del Consumidor" (Department of Consumer Affairs), which controls the prices of pharmaceutical products.

On July 30, 1982, a truckload of 2,805 cartons of Tic Tac candies in a shipping container, from the Tic Tac distributor Ferrero, Inc., and destined for shipment to Ferrero U.S.A. in Clifton, New Jersey, was left unlocked, unsecured, and unguarded outside the Puerto Nuevo shipyards in Puerto Rico by the driver of the truck, one Enriquez Navarro Montanez. When he returned some three (3) hours later, the shipment had disappeared.

Ferrero, Inc. made a deliberate decision not to publicize the apparent theft because it was felt that sales might be hurt as a result. Accordingly, no notice of the theft or disappearance was made through any of the media, and no notice was put out to potential good-faith buyers of the Tic Tacs that a van of the candies had been lost. RT 102-103 (3/13/85) (testimony of Carlo Ceriana, Executive Vice-President of Ferrero, Inc.).

According to the invoice sent by Ferrero, Inc. to Ferrero U.S.A., the total price of the shipment was $59,807.87. However, the bill of lading showed the value of the shipment to be $59,831.15.

Drogueria Isla, Inc. purchased a shipment of Tic Tacs in Puerto Rico for $50,000.00 after Farmedics had found purchasers for the candies in California.

At the trial below, the Government's evidence against the defendant Martin Thuna consisted of (1) Thuna's oral statements to an FBI Agent William Stovall which were

altered by redaction, or "sanitizing," as ordered by Judge Pieras; (2) the testimony of one Felix Vasquez, who had been dismissed from employment as an accountant for Drogueria Save-On, Inc.; and (3) evidence concerning Martin Thuna's purported conduct after Farmedics, Inc. had resold the Tic Tacs, which evidence, the Government contended, showed consciousness of guilt.

A. The Redaction Issue:

On January 28, 1983, Special Agent William Stovall of the Federal Bureau of Investigation visited Martin Thuna without notice at the offices of Farmedics, Inc. in Chatsworth, California, and interviewed him in regard to the missing Tic Tacs. Following his meeting with Thuna, Agent Stovall prepared an investigative report, designated as a "302 Report," summarizing Martin Thuna's statement given in the course of the interview. The text of that report is set out in full in footnote 4 of the Opinion of the Court of Appeals in this case, reproduced in Appendix A hereto (see pages 6-7 thereof).

It will be noted that in the second paragraph of that Report shown in the Opinion (on pages 6-7 of Appendix A), it is stated (with emphasis supplied), in reference to Martin Thuna responding to an inquiry in regard to Tic Tacs:

> *... In this particular instance, he remembered an individual coming to his office there and speaking with the office manager, Juan Ortiz. ...*

On January 22, 1985, the defendant Juan Ortiz-Negron, by his counsel, filed with the District Court a request that the Court order the Government to redact, or sanitize, any statements of codefendant Martin G. Thuna, if and when any such statements were sought to be admitted by the Government, by deleting therefrom "all references to Mr. Juan Ortiz, including the words 'office manager' ," on the ground that any such references would be hearsay and

prejudicial as to Ortiz-Negron, and thus in contravention of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968).[1] Appendix at 6-9.

On February 11, 1985, the petitioner filed with the District Court a document entitled "Position of Martin G. Thuna with Respect to 'Request to Sanitize Statements Made by Co-Defendant Martin G. Thuna' " (Appendix at 10-14). In that submission, Martin Thuna, through his counsel, took no position as to whether his statements were admissible as to either Mr. Ortiz or Mr. Rivera. Martin Thuna, however, stated his position that if his statement were to be introduced against himself, then in the interest of fairness, it should be introduced in its entirety. The responsive paper filed by the petitioner in regard to the matter of redaction states, in part (Appendix at 11-12):

> 4. According to the 302 report, in his statement Thuna explained the involvement of himself and others in a transaction concerning the Tic Tac candies. The redactions requested by co-defendants would create a misleading impression as to Thuna's role in the transaction. Since the crucial issue in this case is each defendant's knowledge of whether the Tic Tac candies were stolen, and since any proof of knowledge will be purely circumstantial, the relative roles played by each person in the transaction bear heavily on the issue of knowledge.
>
> 5. Under the "rule of completeness" embodied in Rule 106 of the Federal Rules of Evidence, if the statement of a party is admitted against him, the party is entitled to have the full statement

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[1] The request to redact or sanitize statements by codefendant Thuna was filed by attorney Jose R. Aguayo on behalf of Juan Ortiz-Negron. No such request was made by Martin Thuna. The docket sheet is erroneous in this regard.

admitted into evidence. *See* 1 Weinstein's Evidence, ¶ 106 [01] at 106-4 (1982) (while Rule 106 is technically limited to written or recorded statements, the "rule of completeness" which it embodies generally applies also to testimonial proof).

6. Co-defendants' argument that Thuna's references to them may not be introduced against them is based on *Bruton v. United States*, 391 U.S. 123 (1968). Redaction is an inappropriate remedy for a *Bruton* problem where the deletions would create a misleading impression. *See* 1 Weinstein, *supra*, ¶ 106 [01], at 106-8 to -9; *Bruton, supra*, 391 U.S. at 143 (White & Harlan, JJ., dissenting) ("the deletion must not be such that will distort the statement to the substantial prejudice of either the declarant of [sic] the Government"). Moreover, the proposed redactions might force Thuna to take the witness stand to resupply the redacted portions, thereby violating his Fifth Amendment privilege not to testify. *See* 1 Weinstein, *supra*, ¶ 106 [01], at 106-8; *United States v. Walker*, 632 [sic] F.2d 708, 713 (7th Cir. 1981) (reversing conviction where a redacted version of defendant's testimony at prior trial was introduced).

In its "Government's Omnibus Reply to Several Motions Filed by Defendants" (Appendix at 15-36), filed February 15, 1985 in the District Court below, the Assistant United States Attorney did not oppose the contentio of defendant Juan Ortiz-Negron that there was a *Bruton* problem with the statement attributed to Thuna in the 302 Report, and suggested to the Court that the statement be sanitized by replacing " . . . office there and speaking with the office manager, Juan Ortiz . . . " with " . . . office there and speaking to a person. . . . " Appendix at 27.

In "Defendant Martin Thuna's Omnibus Reply Memorandum" (Appendix at 37-52), filed February 25, 1985, the petitioner, speaking in reference to the matter of the prejudice to his rights to a fair trial posed by redaction of his statement, observed:

> . . . In the only case cited by the Government where such prejudice was claimed, the court held that redaction of references to a co-defendant is *not* permissible when it deletes exculpatory material. *People v. La Belle*, 18 N.Y.2d 405 (1966).

See Appendix at 43-44.[2]

In the same document, in the Appendix at 45-46, the defendant Martin Thuna, in reference to the "rule of completeness" embodied in Rule 106 of the Federal Rules of Evidence, noted as follows:

> The rule requires that the omitted portion of a party's redacted statement be admitted if such omission is relevant and qualifies or explains the redacted statement. *United States v. Walker*, 652 F.2d 708, 710 (7th Cir. 1981) (reversing conviction where a redacted version of the defendant's testimony from a prior trial was introduced and the deleted portions were explana-

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[2] Continuing, Thuna's reply noted (Appendix at 43-44):

In *La Belle*, two brothers, Richard and Edward, were tried for murder. Edward gave the police a statement that he had been present at the scene of the crime and watched Richard commit it. The prosecution offered the statement at the joint trial with all references to Richard deleted. The Court reversed Edward's conviction, holding that "[t]he injustice of allowing the People to put into evidence only those portions of a statement which incriminate him, with the exculpatory portions deleted, is manifest." 18 N.Y.2d at 411.

Thus, the only case the Government cites that is on point squarely supports Thuna's position. As the Government notes in its brief, *La Belle* was cited by the Supreme Court in *Bruton*. 391 U.S. at 134 n. 10.

> tory and exculpatory); Louisell and Mueller, *supra* § 51 at 206S; 1 Weinstein's Evidence, *supra*, ¶ 106 [01], at 106-6 through 9.

In the same document,[3] the petitioner maintained his position that if the statement were to be admitted at trial, then it must be admitted in its entirety, noting (Appendix at 46):

> . . . Thuna's statement was, as a whole, exculpatory and explanatory of Thuna's precise role in the transaction. The Government's proposed alteration makes the statement seem suspicious and incriminating. . . .

At the pretrial conference of March 6, 1985, the matter of redaction of the statement was discussed further (Appendix at 55-83) and counsel for Martin Thuna restated his position thereon (Appendix at 59-60). During that conference, Thuna's counsel Mr. Armstrong unequivocally placed on the record of the pretrial conference the request of the defendant Martin Thuna for a severance of the defendants for trial,[4] stating (at RT 8:14-20):

---

[3] The petitioner's reply further states (*see* Appendix at 45-46):

Rule 106 applies to statements made by one codefendant in a *Bruton* situation. 1 Weinstein's Evidence, *supra*, ¶¶ 105 [04], 106 [04] at 106-9; *see generally Bruton, supra*, 391 U.S. at 143 (White & Harlan, JJ., dissenting) ("the deletion must not be such that will distort the statement to the substantial prejudice of either the declarant or the Government"). In instances where the declarant insists on the inclusion of his entire statement or nothing, and the Government insists on introducing the statement, "a severance may be the only way of dealing with the matter." 1 Weinstein's Evidence, ¶ 106 [04], at ¶ 106-09.

[4] When attorney Joaquin Monserrate, for codefendant Rivera-Mercado, addressed the Court at RT 16 (3/6/85), in reference to the sentence in question in the 302 Report, the following was recorded:

> MR. MONSERRATE: . . . If it was an admission by Mr. Thuna, let him present it against Mr. Thuna, not against Mr. Rivera. The only solution to that problem would be a severance, your Honor, or—

> MR. ARMSTRONG: V
> not a conspiratorial state
> because in the Governme
> the conspiracy as ending
> suggest, with all due respec
> a problem, Mr. Ortiz certa
> *the only apparent way out*
> both sides can be protec
> position. [Emphasis supplie

But the Court declined to g defendant testified.

Also, significantly, at the pret Court, speaking at RT 9:12-17 statement sought to be redacted,

> THE COURT: Listen,
> does not say that, that he
> says in this particular insta
> individual coming to his of
> with the office manager, J
> say in his statement th
> individual.

And at RT 10:7-12 (3/6/85), prosecutor:

> I just cannot conclude
> mean, there is no con
> following sentence to the se
> your conclusion that as a r
> having a conference with T
> because no place does it ap
> conference with the alleged

THE COURT: Severance of
MR. MONSERRATE: Sure.
THE COURT: No, I do not s

ell, your Honor, it is
ent that is admitted
's indictment, it puts
before that. And I
your Honor, that it is
ly has a problem and
is a severance so that
ed. And that is our
.]

ant a severance and no

ial conference, the District
(3/6/85) in regard to the
was disposed to remark:

isten, that statement
net with anybody. He
ce he remembered an
ce there and speaking
an Ortiz. He does not
t he met with an

udge Pieras stated to the

e same as you do. I
ection between the
tence in question and
sult of this individual
una, Thuna called up,
ear that Thuna had a
ndividual.

---

e case?

e that as any solution—

Shortly thereafter, at RT 13
tor suggested to the Court that
the presence of the jury,[5] so
determined.

The impact of the redaction
of the defense of Martin Th
conference by Mr. Thuna's c
who, speaking at RT 24:12-17,

> The whole question, you
> what, and it makes a tr
> Martin Thuna is seen by
> whom the offer of the T
> when in fact that is not
> jury thinks that he actual
> one to whom the offer was

The importance of the sent
Report was acknowledged by
conference at RT 27:25 - 28:7 (

> The only way that we c
> Thuna was definitely th
> individual that sold the
> own admission

---

[5] The following colloquy ensued:

THE COURT: The problem
problem here, see? Otherwise i
Thuna I would not have that pr
here to be an admission agains
way this is written, the way this

MR. PESQUERA: If I may
as a possible alternative and fa
Mr. William Stovall testifies, we
of the jury. He can be cross-ex
made a determination as to wha
That will be an alternative. B
aware, 302 reports are not an e
of what the person is saying. . . .

6-21 (3/6/85), the prosecu-
Agent Stovall testify outside
hat his testimony could be

uestion from the standpoint
na was made clear at the
unsel Michael Armstrong,
tated:

> Honor, is who knew
> mendous difference if
> ie jury as the fellow to
> c Tacs was first made
> ie truth and when the
> y said that he was the
> irst made. . . .

nce in question in the 302
ie prosecutor at the pretrial
/6/85), when he stated:

> n connect that Martin
> re together with the
> c Tacs is through his

---

is that we have a hearsay
that were an admission of
biem. But it does not appear
the interest of Thuna, the
ntence is structured. . . .
suggest, then, your Honor,
rably for everybody, when
an do it out of the presence
nined and your Honor can
he can testify or not testify.
ause as everybody here is
act and accurate statement

. . .

> I do not have any evidence that the individual — other than Thuna's own admission — that an individual was there together with Martin Thuna and Ortiz —

The District Court entered an order filed March 6, 1985 (Appendix at 128-130) on redaction, reading, in pertinent part:

> The Court fails to see the highly prejudicial or so powerfully incriminating test of *Bruton* in the present case; however, since both Ortiz and the Government have agreed that the statement should be sanitized, the Court hereby ORDERS that the statement should be sanitized by deleting "there and speaking with the office manager, Juan Ortiz."
>
> . . .
>
> The parties will not be allowed during trial to raise any questions related to the deleted statement. If counsel for Mr. Thuna wishes to cross-examine agent Stovall, they are prohibited from attempting to bring out the deleted statement. At the time of cross-examination, counsel for Thuna shall request a side-bar conference and raise for the record his objections to the sanitized version.

On March 12, 1985, the District Court ruled on a motion for reconsideration of the sanitizing order of March 6, 1985, by Thuna and Rivera-Mercado. In so ruling, the Court issued a new order, of March 12, 1985, reaffirming its rationale of the previous order, and ordering a further redaction of Thuna's statement to Stovall, resulting in deletion of the entire sentence: "In this instance, he remembered an individual coming to his office. . . ." Appendix at 170-173.

On March 13, 1985, after three (3) days of trial, and in accordance with the Court's order of March 6, 1985, Thuna's counsel placed on the record his objections to the redaction of Thuna's statement. RT 2-4 (3/13/85); Appendix at 247-249. Shortly thereafter, on the same day, the Government acknowledged its own previous error and moved, in conjunction with Thuna, for either total admission or exclusion of the statement in question in the 302 Report. In particular, speaking at RT 4:5-11 (3/13/85) (Appendix at 249), the Assistant United States Attorney declared:

> MR. PESQUERA: The Government has reconsidered its decision and believes that the statement should be either admitted completely or eliminated, as your Honor has ruled upon, and would suggest that the statement be admitted completely because the prejudicial value that it may have on defendant Ortiz and Alfonso Rivera Mercado are very, very light and it will not constitute any problem.

The joint motion was denied. RT 5:24 - 6:6 (3/13/85); Appendix at 250-251. The redaction order was left in full force and effect. RT 6-7 (3/13/85); Appendix at 251-252.

The same day, March 13, 1985, Agent Stovall took the stand. After several unsuccessful attempts to elicit relevant testimony from him under the redaction order (see RT 2-10 (3/14/85); Appendix at 259-267) the Court ordered that he be questioned on voir dire outside the presence of the jury (RT 10-11 (3/14/85)); Appendix at 267-268). However, even after the jury had left the courtroom, the Court (to the apparent surprise of the Assistant United States Attorney) *still refused to lift the redaction order*, and ordered that Agent Stovall testify in conformity with it. RT 11 (3/14/85); Appendix at 268. Consequently, the trial testimony of Agent Stovall was a product not of what was

actually said to him by Thuna or anyone else but of what the District Judge instructed Stovall to say.[6]

In accordance with the Court's order, when the jury returned, Agent Stovall testified as follows (see RT 15:17-22 (3/14/85); Appendix at 272):

> BY MR. PESQUERA:
>
> Q Repeating the question, Mr. Stovall, what else, if anything, did Mr. Thuna say?
>
> A He told me that he purchased the Tic Tacs from E & M Distributors. He gave me a copy of an invoice reflecting — showing that sale and said

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[6] For the voir dire session, the transcript of record, at RT 11:9 - 14:16 (Appendix at 268-271) reads as follows:

> MR. PESQUERA: Your Honor, can he be instructed that the sanitation is no longer in effect; that you would like to hear—
>
> THE COURT: No, it is in effect. That is the purpose. What we are trying to find out is if his testimony can go to the jury or not. Sure the sanitation is in effect.
>
> Having that in mind, please answer the question.
>
> . . .
>
> THE COURT: I think the question was did he tell you who he bought the Tic Tacs from. That was the question.
>
> And what is the answer?
>
> THE WITNESS: The answer is an individual — E & M Distributors.
>
> THE COURT: An individual or E & M Distributors? Let us make it clear because this is very important. Be precise. Did he say E & M Distributors? We will not have any problem with that, but otherwise yes. What did he say?
>
> THE WITNESS: Yes. E & M Distributors.
>
> . . .
>
> THE COURT: All right. That being clarified — to me it has been clarified by the United States Attorney. Just do not mention an individual or Ortiz at all. Your answer is that, "Yes, he told me that he got it from E & M Distributors," and he gave you an invoice. Is that correct?
>
> THE WITNESS: That's correct.

> that he had done business with E & M Distributors before.

The foregoing testimony, however, is not only factually incorrect but highly and unfairly detrimental to the defense of Martin Thuna. It represents not what Agent Stovall was told by Martin Thuna, but what Stovall was, in effect, programmed to say by the District Judge. In fact, the record shows that *Martin Thuna never said anything to Stovall regarding E & M Distributors.* What happened is that one Jose Ferrer (not Thuna) provided Agent Stovall with two invoices, as shown in the following testimony of Agent Stovall (with emphasis supplied), at RT 11:11-19 (3/13/85):

> Toward the end of our conversation, *Mr. Ferrer* came back in with two different documents, two invoices. One of them was an invoice from E & M Distributors that had a single entry on it or had two entries, two items listed there showing that E & M Distributors had sold Tic Tacs and another thing, I believe soap, to I think it was Drogueria Save-On instead of Farmedics exactly.
>
> Then the other was an invoice showing that Tic Tacs were sold by Farmedics in California to GMCT in California.

The original "E & M Distributors" invoice obtained by Agent Stovall from Ferrer was admitted at trial as Government's Exhibit 11.

It was Jose Ferrer, Farmedics Vice-President, who provided the information regarding the transaction in question to Stovall. RT 20:15-25 (3/14/85); Appendix at 277. It was Jose Ferrer who turned the invoice over to Stovall. RT 18 (3/14/85); Appendix at 275. It was Jose Ferrer who discussed the contact with GMCT. Appendix at 277.

The prosecution produced testimony at trial that the address appearing on the invoice of "E & M Distributors,"

obtained by Agent Stovall from Jose Ferrer, was fictitious. RT 14 (3/14/85); Appendix at 289.

Subsequently, during its cross-examination of Michael O'Connor, the chief financial officer and custodian of records of Martin Thuna's companies, the Government produced for the witness' identification an invoice for a company known as "J. Rodriguez, Inc." The prosecution showed that the address on the latter invoice was the same fictitious address. RT 87-93 (3/22/85); Appendix at 376-382. The prosecution then produced testimony that Jose Ferrer had himself arranged to have the "J. Rodriguez, Inc." invoices printed. RT 22-23 (3/25/85); Appendix at 416-417 (testimony of Dennis Bolton).

The spurious testimony of Agent Stovall, under the trial court's sanitizing order, to the effect that Martin Thuna had told Stovall that he (Thuna) had purchased the Tic Tacs from E & M Distributors, thus invited the jury to conclude that Thuna had engaged in an elaborate cover-up of the source of the Tic Tacs, and thus manifested consciousness of guilt. For this reason, the redaction deprived Martin Thuna of a fair trial, and warrants a reversal of Mr. Thuna's conviction.

B. The Fed.R.Crim.P. Rule 16 Issue:

Discovery in the instant case was requested by all defendants, and an order of the District Court called for discovery on an "open file" basis. The Government represented to all defendants that it was in compliance with the provisions of Fed.R.Crim.P. Rule 16.

However, pursuant to a grand jury subpoena in an investigation of another matter, the Government obtained from Farmedics prior to the trial in this case one or more invoices bearing the heading of "J. Rodriguez, Inc." RT 61-67 (3/22/85); Appendix at 350-356.

On the ninth day of trial, after the Government had rested its case, Thuna called to the witness stand Michael O'Connor, the chief financial officer of Farmedics. Subsequently, on cross-examination, the prosecutor, pursuant to a trial subpoena, received, and questioned Mr. O'Connor concerning, a copy of an "E & M Distributors" invoice which O'Connor had previously provided pursuant to the grand jury subpoena. In his cross-examination of Mr. O'Connor, the prosecutor elicited a comparison of that invoice with Government's Exhibit 11 in the case at bar. In a conference of the Court and counsel just beforehand, the prosecutor commented on what he asserted to be the materiality of the claimed discrepancy between the two documents, stating: "It is showing another inconsistency of documents that have been provided, which is a reasonable inference that these documents were prepared after the fact." RT 64:23-25 (3/22/85).

Counsel for Thuna objected at trial to the introduction of this evidence, arguing that the Government had wilfully failed to comply with Fed.R.Crim.P. Rule 16, and that the evidence was beyond the scope of direct examination and irrelevant. Appendix at 371-372; 396-414. Nevertheless, the District Court overruled Thuna's objection, and admitted the evidence as rebuttal. RT 92, 94 (3/22/85); Appendix at 381, 383.

In truth, however, there was nothing to rebut. The prosecutor's theory of rebuttal was predicated upon (1) the notion that the cross-examination of O'Connor by the Government exposed an inconsistency between the "E & M Distributors" invoice produced in response to the grand jury subpoena, and the one produced for the trial subpoena; and (2) the supposed representation by O'Connor that Farmedics had not done business with any other companies with the same address as that shown on the E & M invoices. In fact, however, Mr. O'Connor never purported to explain the fact that the E & M invoice produced for the grand jury

bore a notation not present on the E & M invoice produced for trial, and in fact he testified that *he did not know* the reason for the difference (RT 71 (3/22/85)); moreover, in regard to the matter of whether Farmedics had done business with any other company with the same address as E & M Distributors, the question and answer were as follows:

> Q — do you know if Farmedics has conducted any business with any other company that has the same address that appears in the E. M. Distributors invoice, specifically 863 Guayama Street, Hato Rey, Puerto Rico?
>
> A Not to my recollection.

This sequence, at RT 86:22 - 87:1 (Appendix at 375-376), shows that Mr. O'Connor *never affirmatively denied* that Farmedics had done business with another company at the address given on the E & M invoices. The "J. Rodriguez, Inc." invoice (admitted as Government's Exhibit 69) rebutted nothing, but rather belonged logically to the prosecution's case-in-chief. The objection of Martin Thuna's counsel at the trial to the admission of Exhibit 69 was stated in a bench conference at RT 82-83 (3/22/85).[7]

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[7] Defense counsel's objection was stated as follows:

> MR. ARMSTRONG: Your Honor, if I may, these documents that he is referring to now were not turned over in the course of the discovery in this case, were not listed on the Government's list of exhibits, were not made available to us in any way. It is fatuous for him to say that this is rebuttal evidence. What it is is evidence in chief that he was obliged to bring in. He is not rebutting anything with this witness. He served a subpoena on him himself and is now wanting to get this evidence in because the man did not, he says, comply with the subpoena or something. But clearly, if there was evidence of a document relating to E & M Distributors, which we do not know anything about, . . . , and if this document is put in now after the Government has rested its case, when there was a specific list of documents given to us

As a result of the improper introduction of the "J. Rodriguez, Inc." invoice, the stage was set for the testimony of Dennis Bolton in the prosecutor's effort to show a "cover-up" on the part of Thuna.

At RT 88 (3/22/85), counsel for the petitioner moved for a mistrial based upon the unfairly prejudicial nature of the introduction of the J. Rodriguez, Inc. invoice.

C. The Issue of the Dennis Bolton Testimony:

After Thuna had rested, the Government called Mr. Dennis Bolton as a witness, purportedly for rebuttal. Appendix at 396-422. Mr. Bolton was a printer located in California. RT 21 (3/25/85); Appendix at 415.

Through this witness the prosecution sought to bring about an inference by the jury that Martin Thuna had ordered Jose Ferrer to have printed a set of invoices under the heading of "J. Rodriguez, Inc."; that since the J. Rodriguez invoice and the E & M Distributors invoice bore the same fictitious address and telephone number, the E & M Distributors invoice was false; and that "E & M Distributors" was a fictitious company whose name was used by Martin Thuna in an attempt to cover up the purchase of the stolen Tic Tacs. RT 9-12 (3/25/85); Appendix at 403-406.

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as the documents that were going to be used in this case and when there was a specific order of this Court under Rule 16 to make open file discovery, they cannot hold back this document and pretend that it was held for rebuttal. It is ridiculous. This is not rebuttal evidence. Anything to do with E & M Distributors is something that is vital to the direct charge in this case and should have been turned over to the defense pursuant to Rule 16 and pursuant to the orders of this Court and pursuant to the document list submitted by the Government. This is not proper rebuttal, your Honor.

Prior to Mr. Bolton's taking the stand, counsel for Martiin Thuna objected to the admission of Mr. Bolton's testimony after the defense had rested, in that (1) the testimony of Mr. Bolton was not true rebuttal in response to the testimony of Mr. O'Connor or any other defense evidence, since the matter of J. Rodriguez, Inc. was raised by the prosecution, not the defense; (2) that it was unfair in that copies of the relevant documents (invoices) had not been provided to the defense under the applicable rules amd orders re discovery; (3) that the proffered testimony of Dennis Bolton was irrelevant in that the contact with Mr. Bolton was not by Martin Thuna, but by Jose Ferrer, who was not a coconspirator in this case, and occurred one year after the alleged offense, and six months after the E & M invoice was turned over to Agent Stovall. RT 2-20 (3/25/85); Appendix at 396-414. Objection was also made that the testimony should have been excluded as unjustly prejudicial, under Rule 403 of the Federal Rules of Evidence. RT 13 (3/25/85); Appendix at 407.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S REDACTION ORDER WAS NOT WARRANTED BY *BRUTON*, DISTORTED THE MEANING OF THE PETITIONER'S STATEMENT AND AGENT STOVALL'S TESTIMONY, AND UNFAIRLY PORTRAYED THE PETITIONER AS KNOWING, AND ATTEMPTING A DECEPTION IN REGARD TO, THE SOURCE OF THE TIC TACS.

The unredacted 302 Reportt prepared by FBI Agent Stovall, following his interview with the petitioner, is

exculpatory, since it indicates that the person who apparently offered the Tic Tacs for sale conferred with Juan Ortiz and not with Martin Thuna. The sentence so indicating (that Ortiz, not Thuna, met with the offeror) however, was stricken from the statement of the petitioner in the Report, under the Court's "sanitizing" order.

The redacted 302 Report, and the testimony of Agent Stovall as dictated by the District Judge, were, however, distinctly *inculpatory* and incriminating, since Agent Stovall was *compelled* to testify (see RT 15:19-22 (3/14/85)):

> He [i.e., Martin Thuna] told me that he purchased the Tic Tacs from E & M Distributors. He gave me a copy of an invoice reflecting — showing that sale and said that he had done business with E & M Distributors before.

The foregoing testimony was given without basis in fact or in the record of this case. Moreover, Agent Stovall's constrained testimony enabled the prosecution to lay the groundwork for an invitation to the jury to make an elaborate sequence of inferences to the effect that Martin Thuna had attempted to cover up involvement on his part in regard to the stolen shipment of Tic Tacs. The Court of Appeals, in its Opinion in this case, maintained: "The record indicates, however, that it was testimony, rather than any negative inferences drawn from the redaction or limitation on cross-examination, that created any 'impression that Thuna purchased the Tic Tacs from a company known as E & M Distributors.' " (See Appendix A hereto.) What the Court of Appeals overlooks, however, is the *even during the very process of voir dire* whereby Agent Stovall, out of the presence of the jury, testified, supposedly in order to apprise the District Court as to what his testimony actually was, and whether that testimony could "go to the jury or not" (RT 11:13-14 (3/14/85)), the sanitizing gag order was in effect (RT 11:12-13 (3/14/85)),

so it is difficult to see how the District Court ever had an opportunity to actually assess what the true and unfettered testimony of Agent Stovall would have been.

The Court of Appeals, in footnote 8 of its Opinion, refers to the statement at the end of the 302 Report that "Thuna advised *his company* had purchased other things from E & M Distributors in the past." At the direction of the District Court, however, this was changed, when Agent Stovall testified in front of the jury, to: "He told me that *he* purchased the Tic Tacs from E & M Distributors." (Emphasis supplied.) The latter version has an entirely different tenor. It is misleading in that it distinctly imports the element of personal knowledge on Martin Thuna's part, as to E & M Distributors, the object of the prosecution's intensive impeachment efforts at the trial. In fact, however, it was Jose Ferrer, and not Martin Thuna, that furnished an "E & M Distributors" invoice to Agent Stovall. There was simply no rationale for imputing to Martin Thuna any and all knowledge held by his Puerto Rican operation.

Moreover, the redaction that was made was not warranted by any *Bruton* problem in the case at bar. This was acknowledged by the Government at RT 4-5 (3/13/85) (Appendix at 249-250). Indeed: "Bruton does not require that all references to codefendants be eliminated. It only requires the elimination of those that directly implicate a defendant other than the declarant, when that identification is not established by independent evidence." *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981); see *Bruton, supra*, at 391 U.S. 127-128, 88 S.Ct. 1623. In the instant case, however, the 302 Report and the testimony of Agent Stovall were not the only evidentiary nexus implicating Juan Ortiz in the allegedly unlawful activities linked to Martin Thuna's companies. At trial below, Michael O'Connor, the chief financial officer for the Thuna companies, testified that Juan Ortiz, who was Martin Thuna's Vice President, was in charge of Thuna's Puerto

Rican operation, and was "responsible for all purchases made in Puerto Rico and going to California." RT 57 (3/22/85). Additionally, Felix Vasquez testified that Juan Ortiz was present when Martin Thuna told him [Vasquez] to prepare the ten checks, for $5,000 each, which the prosecution sought to tie in with the shipment of Tic Tacs. RT 9(3/14/85). (See the Court of Appeals' Opinion at page 3 of Appendix A.)

Nevertheless, the redaction was ordered and carried out at the trial, in blatant contravention of the rule of completeness as outlined in Rule 106 of the Federal Rules of Evidence. Contrary to the statement in footnote 7 of the Opinion at page 9 of Appendix A, Thuna *did* invoke the rule of completeness on appeal, stating, at page 32, lines 9-12, of his Appellant's Brief: "Under the rule of 'evidentiary completeness', Thuna was entitled to reveal such omitted portions as were necessary to prevent distortion. McCormick, *Evidence* Sec. 56 (2d ed. 1972)." The rule of completeness represents judicial recognition that when witness statements are taken out of context or modified, the result may be misleading to the jury, and detrimental and prejudicial to a defendant, beyond the level of any harmless error. *See United States v. Walker*, 652 F.2d 708, 713-714 (7th Cir. 1981) (slanted and selective presentation of defendant's prior testimony warranted reversal).

Martin Thuna was visibly prejudiced by the redaction. The redaction completely distorted the statement given to Stovall by Thuna, giving the jury the false impression that Thuna stated that he had purchased the Tic Tacs from E & M Distributors, and leading to damaging evidence of a "cover-up" on Thuna's part.

Moreover, because of the sanitizing order, Thuna's counsel had no opportunity to engage in meaningful cross-examination of Agent Stovall. This resulted in an unjust enhancement of the Stovall prosecution testimony. The right of a defendant to cross-examine adverse witnesses in a

criminal trial is guaranteed by the Confrontation Clause of the Sixth Amendment to the Constitution. *Davis v. Alaska*, 415 U.S. 308,. 315-316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (trial court's grant of protective order curtailing cross-examination of juvenile witness required reversal and remand, notwithstanding state policy of preserving confidentiality of juvenile offender's record). Moreover: "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* Where cross-examination has been curtailed, the prosecution has a heavy burden to show harmlessness beyond a reasonable doubt. *Hoover v. State of Maryland*, 714 F.2d 301, 306 (4th Cir. 1983) (cross-examination abridged; habeas corpus relief upheld).

Additionally, Martin Thuna was prevented by the redaction from taking the witness stand on his own behalf. Since the statement attributed to Thuna in the Stovall testimony was distorted, Thuna, had he taken the stand, would have had to either mimic the bogus version of the facts in the Stovall testimony under the redaction order, to his own detriment, or testify independently of Stovall, inviting the jury to infer that he was now giving a different, and disingenuous, version of what he had originally told Stovall. This court-created dilemma threatened to destroy Thuna's defense in the eyes of the jury, were Thuna to testify.

The Court of Appeals found itself "unpersuaded" of this, and suggested that had Thuna testified, the District Court would have lifted the redaction order. (Opinion; see Appendix A at 12.) However, the appellate tribunal overlooked the fact that the District Court did not predicate its redaction order upon *Bruton*. As shown above, the trial court, in the text of its order, dated March 6, 1985, expressly disclaimed any reliance on *Bruton*, stating, "The Court fails to see the highly prejudicial or so powerfully incriminating test of *Bruton* in the present case; however,

since both Ortiz and the Government have agreed that the statement should be sanitized, the Court hereby ORDERS that the statement be sanitized. . . . " (Appendix at 129.) However, when the Government acknowledged its error in citing a "*Bruton* problem" in the context of this case, the District Court arbitrarily refused to reconsider its earlier redaction order. RT 6 (3/13/85); Appendix at 251. Thus, given the fact that there remained the out-of-court statement of Thuna which was hearsay as to Juan Ortiz-Negron and Alfonso Rivera-Mercado, there was no reason for Thuna or his counsel to believe that if Thuna made himself available as a witness at trial, the Court would have agreed to lift the redaction order.

The Court of Appeals agreed with the District Court that the deleted portion of the 302 Report was not exculpatory. (Opinion; see Appendix A at 11.) However, it was exculpatory because it indicated that Martin Thuna was not in direct contact with the source of the stolen Tic Tacs, and thus that he was not aware that they were stolen. Though the prosecutor, at the pretrial conference, claimed that after he had "conversed thoroughly" (RT 14 (3/6/86)) with Agent Stovall, a different version of the facts had come to light, the prosecutor himself was neither a percipient witness nor under oath, and could not himself testify; and Stovall never testified to the effect that anyone offering Tic Tacs ever spoke directly to Thuna. The exclusion of the redacted statement was therefore unreasonably harmful to Martin Thuna's defense.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S ALLOWANCE INTO EVIDENCE OF THE "J. RODRIGUEZ, INC." INVOICES AS "REBUTTAL" EVIDENCE.

The "J. Rodriguez, Inc." invoices were not produced for the defense as required by Fed.R.Crim.P. Rule 16. The prosecution claimed that discovery of the invoices was not required because they were not for use in the Government's case-in-chief, but only as rebuttal evidence. However, rebuttal evidence excludes all evidence which has not been made necessary by the opponent's case in reply. Wigmore on Evidence (Chadbourn rev. 1976), Sec. 1873, at 672. In the case at bar, the evidence of the J. Rodriguez, Inc. invoices simply was not made necessary by the defense case of Martin Thuna. Rather, it was prompted by a contrivance of the prosecution itself, namely, cross-examination of Michael O'Connor in regard to a subpoena that had been issued to him by the Government. The J. Rodriguez invoices were, logically, an integral part of the Government's case, not the defense. As shown hereinabove, Michael O'Connor never made any actual representation on the witness stand which was controverted by the J. Rodriguez invoices. By evading the discovery rules, the prosecution was able to unfairly surprise the defense with evidence of a purported cover-up of a purchase of the Tic Tacs.

The Court of Appeals relies on the District Court's rationale that the J. Rodriguez, Inc. invoices were rebuttal evidence because they were directed toward impeachment of "the documents he [O'Connor] brought into play." But the related documentary evidence was all introduced or employed in the prosecution's cross-examination of O'Connor, not in direct examination, and that cross-examination appears to have gone well beyond the scope of

direct. The purported "rebuttal" was thus engineered by the prosecution. The door was thereby opened for the spurious "rebuttal" testimony of a purported cover-up, given by Dennis Bolton. The District Court's failure to exclude the evidence not provided was certainly not harmless beyond a reasonable doubt.

Significantly, the "J. Rodriguez, Inc." invoice that the prosecutor showed to O'Conner on cross-examination was not an invoice that O'Conner had seen before, or that had any necessary relation to the files in O'Conner's charge. Rather, it was a blank invoice that had been obtained by the Government directly from the printer Dennis Bolton. The Government was thus offering the invoice (Exhibit 69) as a document obtained from its source, namely, the defendant Martin Thuna. Accordingly, it was incumbent, upon the Government to produce the same, and avoid unfair surprise, in accordance with Fed.R.Crim.P. Rule 16.

III. THE DENNIS BOLTON TESTIMONY SHOULD HAVE BEEN EXCLUDED.

That testimony was presented as "rebuttal," but it was not, for the same reasons that the evidence of the "J. Rodriguez, Inc." invoices was not, bona fide rebuttal. Moreover, the Bolton testimony was irrelevant, since it referred to an order for the printing of an invoice, an order placed not by Martin Thuna but by Jose Ferrer. The Bolton testimony invited the jury to speculate that, because the address on the head of the E & M invoice, given by Jose Ferrer, was the same as the address on the J. Rodriguez, Inc. invoice, then (in view of the redacted Stovall testimony) Martin Thuna must have schemed to cover up a purchase of stolen Tic Tacs by him. Because the Bolton testimony was presented improperly as "rebuttal" and because the Government circumvented Fed.R.Crim.P. Rule 16 in regard to the J. Rodriguez invoice, the defense was deprived

of an opportunity to prepare and mount an effective cross-examination of Bolton. The defendant Martin Thuna was thus denied a fair trial, in violation of the Fifth and Sixth amendments.

CONCLUSION

To allow this Court's review and supervision of this case, the present Petition for Writ of Certiorari should be granted.

DATED: June 16, 1986

Respectfully submitted,

LAW OFFICES OF
MICHAEL T. KENNEY

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Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1422

UNITED STATES OF AMERICA,

Appellee,

v.

MARTIN G. THUNA,

Defendant, Appellant.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr.,
U.S. District Judge]

Before
Campbell, Chief Judge,
Bownes and Breyer, Circuit Judges.

Alberto Tellechea with whom *Law Offices of Francisco M. Lopez-Romo* was on brief for appellant.

Ricardo R. Pesquera, Assistant United States Attorney, with whom *Jose A. Quiles*, Acting United States Attorney, was on brief for appellee.

March 18, 1986

CAMPBELL, *Chief Judge.* Martin G. Thuna appeals from his conviction for the possession and interstate transportation of stolen goods. Thuna contends that the district court committed reversible errors, including:

(a) redacting a statement given by Thuna to an FBI agent, and refusing to allow him to cross-examine the agent on the deleted material; (b) failing to exclude prosecution evidence that Thuna claims should have been, but was not, shown to him earlier; (c) admitting the testimony of Dennis Bolton, a printer, although Bolton's testimony was irrelevant and was improper rebuttal; and (d) giving instructions that eased the government's burden of proof on the issue of appellant's state of mind. Since we do not find merit in any of these arguments, we affirm.

I.

The evidence at trial tended to establish the following:

Martin Thuna was the president of Farmedics, Inc. a California pharmaceutical and health products distributor. He was also the president of two companies in Puerto Rico, Drogueria Save-On and Drogueria Isla, which purchased most of the merchandise subsequently distributed by Farmedics.

On July 30, 1982, a container loaded with 2,805 cartons of Tic Tac candies was stolen from Ferrero, Inc., a Tic Tac distributor based in Puerto Rico.[1] Four days later, while on a business trip to Puerto Rico, Thuna phoned the executive vice president of Farmedics, Jose Ferrer, to determine if Farmedics could sell some Tic Tacs. After quickly checking with some California distributors, Ferrer reported to Thuna that Farmedics would be able to sell the candy.

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[1] Ferrero, Inc., receives Tic Tac candy from Italy, packages it in Puerto Rico, and ships it both to Ferrero U.S.A., a New Jersey-based distributor, and to a Canadian distributor.

A distributor Ferrer contacted spoke to others, one of whom wrote down the information he received about the Tic Tacs. His figures on the quantity and flavors available, relayed to him by this distributor who had been contacted by Ferrer, exactly matched the quantity and flavors of the stolen shipment of Tic Tacs as recorded on the bill of lading pasted to one of the stolen cartons. According to the government, this suggested that Thuna had a copy of the bill of lading in front of him when he contacted Ferrer. If Thuna did have the bill of lading, he certainly would have known that the Tic Tacs were stolen, since that document listed the intended recipient of the shipment.

After he heard that it would be possible to sell the Tic Tacs, Thuna instructed Felix Vasquez, an accountant for Drogueria Save-On, to prepare ten checks for $5,000 each, payable to fictitious names. Thuna then purchased the load of stolen Tic Tacs for $50,000, and shipped it to Farmedics on August 4. Farmedics promptly sold the Tic Tacs to James Miller, a distributor.

Several weeks later, Miller received some inquiries as to whether the Tic Tacs he had distributed were legitimate. Miller called Ferrer, who stated that the Tic Tacs were not stolen and that documentation was available. Miller subsequently returned approximately 1,262 cartons of the candy that he was unable to sell. Farmedics then sold the returned candy to Peninsula Brokerage, which sold them to Opportunity Sales.

Over the next several weeks, Opportunity received information from various sources that the candy it had purchased might have been stolen. Opportunity reported this information to Peninsula, which promptly made inquiries to Farmedics. Farmedics representatives, including Thuna himself, gave assurances that the candy was not

stolen. Despite the repeated inquiries, Farmedics made no effort to check with Ferrero U.S.A., the American distributor of Tic Tacs, to determine the legality of the shipment. Eventually, Opportunity contacted the FBI, the Marshals Service, and Ferrero U.S.A. After checking the production code numbers on the candy, Ferrero determined that the Tic Tacs being sold by Opportunity were from the stolen load, and purchased the remaining 370 cases in Opportunity's stock.

Felix Vasquez, the accountant for Drogueria Save-On, testified that about a month and a half after the original purchase in Puerto Rico (soon after the initial inquiries regarding the legality of the Tic Tacs were made), Thuna delivered to him an invoice bearing the name of E&M Distributors purportedly documenting the purchase of 1,380 cases of Tic Tacs. Thuna instructed Vasquez to enter the invoice amount into accounts payable. In addition, Vasquez testified that on January 17, 1983, after Ferrero had determined that the Tic Tacs were stolen, Thuna requested that the accountant return to him the ten cancelled checks, made out to fictitious names, that had reportedly been used to pay for the Tic Tacs.

On January 28, 1983, FBI Agent William Stovall went to the California offices of Farmedics to interview Thuna about the stolen Tic Tacs. Thuna presented the invoice showing that he had purchased the candy from E&M Distributors, and said that he had done business with E&M before. At trial, however, the government presented evidence that the address given on the E&M invoice does not exist; that of the two telephone numbers listed, one belonged to a gas station and the other to a private individual; and that the company was not incorporated in Puerto Rico.

Thuna also told the FBI agent that the Tic Tacs he purchased from E&M were sold directly to Peninsula Brokerage. He failed to mention the original sale to Miller and Miller's subsequent return of the unsold candy, nor did he reveal that he had received inquiries as to the legitimacy of the candy.

On September 24, 1984, a federal grand jury returned four-count superseding indictments against Thuna and Juan Ortiz Negron and a two-count indictment against Alfonso Rivera Mercado for their roles in possessing and transporting the stolen load of Tic Tacs.[2] Trial by jury began on March 11, 1985. At the close of the government's case, all three defendants moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29. Thuna's motion was granted on the two conspiracy counts, but was denied on the remaining two counts.[3]

On March 25, 1985, the jury returned a verdict finding Thuna guilty of possession of goods known to be stolen and having a value in excess of $100, and of interstate transportation of goods known to be stolen and having a value in excess of $5,000. The court sentenced Thuna to

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[2] The indictments charged Thuna and Ortiz with (1) conspiracy to possess goods of a value in excess of $100 that had been stolen in interstate commerce, 18 U.S.C. §§ 659 and 371; (2) possession, or aiding and abetting the possession, of such goods, 18 U.S.C. §§ 659 and 2; (3) conspiracy to transport in interstate commerce stolen goods of a value in excess of $5,000, 18 U.S.C. §§ 2314 and 371; and (4) interstate transportation, or aiding and abetting the interstate transportation, of such goods, 18 U.S.C. §§ 2314 and 2. Rivera was charged with the first two of these counts.

[3] Ortiz's motion was granted on all four counts, and Rivera's motion was granted on the conspiracy count. The jury acquitted Rivera on the remaining count.

eight years on each count, the sentences to run concurrently. Thuna appealed.

II.

After his January 28, 1983 meeting with Thuna in California, FBI Agent Stovall prepared a "302 Report" summarizing what Thuna had told him. Part of the 302 Report appears to refer to the manner in which Thuna came to know of the load of Tic Tacs. It reads in part,

> In this particular instance, he [Thuna] remembered an individual coming to his office there [in Puerto Rico] and speaking with the office manager, Juan Ortiz. Thuna advised he contacted his salesman, Jose Ferar [sic], in the U.S. and asked him if he thought they could sell these items.[4]

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[4] The full 302 Report reads as follows:

> Martin G. Thuna, President, Farmedics, Inc., 21020 Superior Street, Chatsworth, California, telephone 709-3713, was advised of the identity of the interviewing agent and that the purpose of his interview concerned a sale of Tic Tacs made by his company to another company in the Los Angeles area. Also present during the interview was a salesman, Jose Ferar [sic]. Thuna advised as follows:
>
> He recalled his company's purchase of Tic Tacs in Puerto Rico and requested that paperwork be obtained to cover this purchase. He advised that in July and August 1982, he was in Puerto Rico. His company also operates in Puerto Rico under the name of Drogueria Savon [sic], 1322 Jesus Pinero Caparra Terrace, Puerto Rico. His company purchases prescription-type [sic] medications and other items to be sold in pharmacies and ships them to the U.S. for sale. He advised that they do not normally purchase candy or food items; most of his items are controlled substances. *In this*

Prior to the trial, co-defendant Juan Ortiz moved for redaction of Thuna's statement. Ortiz contended that the reference implicating him was hearsay, and impermissibly violated his sixth amendment rights because the declarant,

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particular instance, he remembered an individual coming to his office there and speaking with the office manager, Juan Ortiz. Thuna advised he contacted his salesman, Jose Ferar [sic], in the U.S. and asked him if he thought they could sell these items. At that time, Ferar [sic] advised he telephoned around and contacted Paul P. Lawson, of Hilton-Tjaden-Brown, 11643 Telegraph, Santa Fe Springs, California, 949-0500, and asked them if he could use the Tic Tacs. Lawson in turn, referred him to Victor Trutanich, of Gibbs, McCormick, Trutanich Food Brokerage, 613 West Ninth Street, San Pedro, California. They sold the total amount received in the U.S. to Trutanich.

Thuna then furnished an invoice dated August 3, 1982 from E&M Distributors, Inc., Calle Guayama 863, Hatorey [sic], Puerto Rico. This invoice reflects that Farmedics purchased 1,380 cases of assorted Tic Tacs at $28.00 a case, for a total purchase of $38,640.00. The vendor indicated on this form appears to be J.C. This invoice also reflects one other purchase of 72 cases of Lifebuoy soap. Thuna also furnished a sales invoice from Farmedics to GMCT, 613 West Ninth Street, San Pedro, California, for 1,244 cases of Tic Tacs. The difference in the number of cases purchased and the number of cases sold by Farmedics in California was brought to the attention of Thuna. He advised they sold all they had received and that probably they had not received the entire amount. Some of the cases of Tic Tacs could have been sold in Puerto Rico. Thuna advised his company had purchased other things from E&M Distributors in the past. Attached are xeroxed copies of the above described sales invoices.

SA William R. Stovall 1/31/83

(Emphasis added.)

Thuna, was not subject to cross-exmaination.[5] The district court, relying on *Bruton v. United States*, 391 U.S. 123 (1968), granted Ortiz's motion and ordered the sanitation of Thuna's statement by deleting the words "there and speaking with the office manager, Juan Ortiz." Subsequently, upon motion of co-defendant Rivera, the court ordered the deletion of the entire sentence "In this particular instance he remembered an individual coming to his office there and speaking with the office manager, Juan Ortiz."[6]

Thuna objected to leaving out the sentence on the grounds that it would create a misleading impression as to his role in the transaction. He argued that the relative roles played by each co-defendant bore heavily on the issue of his knowledge. Thuna also strenuously objected to the court's accompanying order that counsel refrain from examining Agent Stovall at trial in such a way as to bring out the deleted material. On appeal Thuna argues that the court's failure to pay heed to his objections was prejudicial to his defense and violated his sixth amendment right to cross-examination.

Thuna never moved formally to sever the trial of his case from that of the co-defendants. *Contrast United States v. Gonzales*, 749 F.2d 1329 (9th Cir. 1984); *State v. Barnett*, 53 N.J. 559, 252 A.2d 33 (1969); *People v. LaBelle*, 18 N.Y.2d 405, 276 N.Y.S.2d 105, 222 N.E.2d 727 (1966); *cf. United States v. Meacham*, 626 F.2d 503, 510-12 (5th Cir. 1980). If the co-defendants had not been tried with him, of course,

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[5] The district court ruled that Thuna's statement was an admission, and thus admissible as to him. Fed. R. Evid. 801(d)(2). As against co-defendants Ortiz and Rivera, however, the statement (as told to and reported by Agent Stovall) was inadmissible hearsay.

[6] According to the government, Rivera was the "individual" referred to in the deleted sentence.

his whole statement could have come in. But even without having formally taken such an initiative, Thuna was entitled to object to use of any truncated version of his statement that significantly distorted the statement's original tenor in a way prejudicial to him. A court may not recast admissible evidence so as to create a materially false impression that is harmful to the interest of one of the parties.[7]

Thuna argues that the redaction of his statement was harmful in that it distorted the nature of his testimony, "giving the jury the impression that Thuna purchased the Tic Tacs from a company known as E&M Distributors and eliminating Thuna's explanation as to how the existence of the Tic Tacs became known to him."

The record indicates, however, that it was testimony, rather than any negative inferences drawn from the redaction or limitation on cross-examination, that created any "impression that Thuna purchased the Tic Tacs from a company known as E&M Distributors."[8] Agent Stovall

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[7] In objecting to redaction below, Thuna referred to Fed. R. Evid. 106, the "rule of completeness", though he does not do so on appeal. Even assuming it is relevant, it is clear that application of rule 106 is left to the sound discretion of the district court. *See United States v. Dorrell*, 758 F.2d 427, 434-35 (9th Cir. 1985); *United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 914 (1985). In reviewing the exercise of the trial court's discretion, we would place heavy emphasis on the possible prejudice to Thuna. *See United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982) ("The rule of completeness is violated, and severance required, only where admission of the [redacted] statement in its edited form distorts the meaning of the statement or excludes information substantially exculpatory of the declarant."); *United States v. Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982). Since, as we discuss below, Thuna was not prejudiced by the redaction, we would find no abuse of discretion if the rule were an issue on appeal.

[8] E&M Distributors is also mentioned at the end of the statement

testified that Thuna stated at their January 28 meeting that he, Thuna, had purchased the Tic Tacs from E&M Distributors, and that he had done business with E&M before.[9] Thuna was free to cross-examine Stovall regarding anything Thuna reportedly said about E&M and his purported prior dealings with that company, as long as his cross-examination did not bring out the deleted sentence.

To be sure, had the deleted sentence been left in, Thuna's counsel might have argued that because Thuna only "remembered an individual coming to his office there and speaking with the office manager, Juan Ortiz," he himself was only peripherally involved. But this is scarcely much of an argument in the circumstances of this case. Thuna and Ortiz shared an office in Puerto Rico at the time of the purchase. In the deleted sentence itself, Thuna admits to remembering the contact between "an individual" and Ortiz. In the next sentence, Thuna speaks of himself contacting his salesman, Ferrer, in the United States and asking if he thought they could sell the product. It is hard to see how the sanitized version is either more or less harmful to Thuna than the complete one. It was not important whether or not Thuna alone dealt directly with the seller. What the government needed to show was that, in purchasing the stolen candy, Thuna had knowledge that it

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given to Stovall. *See* note 4, *supra*.

[9] Appellant appears to claim that the district court ordered Agent Stovall to *change* his testimony by replacing the deleted sentence with "Yes, he [Thuna] told me that he got [the Tic Tacs] from E&M Distributors." We read the record quite differently. The district court was simply instructing Stovall to avoid repeating so much of Thuna's statement as inculpated Ortiz and Rivera. In testifying that Thuna said he had purchased the candy from E&M, Stovall was merely restating what he had said earlier during direct examination.

was stolen, and on this issue the deleted sentence had little, if any, bearing. The government sought to prove that Thuna knew that the Tic Tacs were stolen from the following facts evinced at trial, among others: that Thuna claimed to have purchased the Tic Tacs from E&M Distributors, a company he said he had done business with before, when in fact the company did not exist; that prior to his actual possession of the Tic Tacs, Thuna had exact quantity and flavor figures for the shipment, suggesting that he may have had a copy of the bill of lading; that Thuna sought to purchase the candy by using ten checks for $5,000 each, made out to fictitious names; that he gave assurances to purchasers that the shipment was not stolen without ever calling the distributor of the Tic Tacs to determine if they were in fact stolen; that he did not provide his accountant with documentation of the purchase until after he received inquiries regarding the legitimacy of the candy; and that he failed to give Agent Stovall accurate information about the path of the Tic Tacs after the purchase by Farmedics.

The redacted sentence does not reduce the strength of the resulting inferences. As the district court stated in a pretrial order, "the deleted portion is not an exculpatory statement, nor is it a statement that tends to show that someone else committed a crime rather than the declarant." At most, the statement served to demonstrate that Oritz (as well as Thuna) was aware that the candy was stolen; it did not tend to lessen any likelihood that Thuna himself knew the stolen nature of the goods.

Nor would the deletion cause confusion regarding the ownership of E&M, as Thuna contends. The government presented substantial evidence that E&M Distributors does not exist, and Thuna was free to challenge any of this evidence. In sum, the deletion of the sentence, and the

limitation upon cross-examination of Agent Stovall that necessarily accompanied it,[10] did not make the statement misleading in respect to its author, Thuna. We, therefore, find no prejudice to Thuna.

Thuna also maintains that redaction of the statement prevented him from taking the stand. We are unpersuaded by this argument. Had Thuna testified, the *Bruton* problem would have vanished, since there would no longer have been a hearsay problem vis-a-vis Ortiz and Rivera. *See Nelson v. O'Neil*, 402 U.S. 622, 627 (1971) ("The Constitution as construed in *Bruton*, in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination."). Any concerns Thuna may have had lest his testimony regarding the roles of Ortiz and Rivera would be in seeming conflict with the redacted statement could easily have been resolved by asking the district court to lift the redaction order and permit the recalling of Agent Stovall to testify to the deleted portion.

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[10] Thuna's statement was admitted solely through the testimony of Agent Stovall. Therefore, it was necessary to restrict examination of Stovall — both on direct and cross-examination — in order to effectively keep out Thuna's inculpation of Ortiz and Rivera. Since the deletion of the sentence was not prejudicial to Thuna, it was within the district court's discretion to so limit cross-examination, and no independent sixth amendment issue is raised. We note, however, that even if the denial had been upon a proper and material subject for cross-examination, the denial would have been harmless. *See United States v. Brown*, 603 F.2d 1022, 1026-27 (1st Cir. 1979); *United States v. Honneus*, 508 F.2d 566, 572 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Wheeler v. United States*, 351 F.2d 946, 947 (1st Cir. 1965).

III.

Thuna next contends that the district court erred when it denied his motion to exclude a blank invoice headed "J. Rodriguez, Inc." Thuna argues that this invoice was really part of the prosecution's case-in-chief and, not having been disclosed to defendant prior to trial, should not later have been allowed to be introduced in evidence. Fed. R. Crim. P. 16(a)(1)(C).[11]

The "J. Rodriguez, Inc." blank invoice was offered by the government during its cross-examination of Michael O'Connor, a witness called by Thuna who was the chief financial officer and records custodian for Thuna's companies. During direct examination, O'Connor identified a number of business records that seemingly demonstrated that on January 17, 1983, Thuna was at his Farmedics offices in California. These documents tended to contradict the testimony of Thuna's accountant, Felix Vasquez, that Thuna had been in Puerto Rico on January 17, and while there had ordered Vasquez to return to him the ten cancelled checks used to pay for the stolen Tic Tacs.

On cross-examination O'Connor was shown the "J. Rodriguez, Inc." invoice. He testified that he had seen such

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[11] Fed. R. Crim. P. 16(a)(1)(C) provides,

> (C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

invoices before because Farmedics had purchased merchandise from that company. The government then proceeded to show that the J. Rodriguez invoice bore the same fictional address as was on the E&M invoice, and that Jose Ferrer, the Farmedics vice president, had himself arranged to have the J. Rodriguez invoices printed. From this evidence the jury could conclude that the J. Rodriguez invoice had been fabricated. If so, other records of Farmedics, possibly including those documents used to show that Thuna was in California on January 17, might also have been falsified.[12]

We cannot say that the district court abused its discretion in admitting the J. Rodriguez invoice, as it was relevant to the weight the jury should give to the documents admitted on direct examination of O'Connor. A trial court has wide discretion in ruling on such matters. As regards compliance with Rule 16, the court could reasonably have found that the invoice was rebuttal, not part of the government's case-in-chief, and that the exhibit was obtained not from the defendant but from a printer, as the government claimed. Thuna does not contend that the invoice would have been material to the preparation of his defense.

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[12] While the government did not fully explain that it was offering the J. Rodriquez invoice in order to impeach the documentary evidence presented through O'Connor, the district court appears to have relied on the rationale, at least in part. In response to strenuous objection to admission of the invoice by Thuna'a counsel, the court observed,

> we have been talking about these documents [the J. Rodriquez and E&M Distributors invoices] all the time. Now, we do bring into evidence this witness O'Connor with all the documents he brought into play as to the dates when Thuna was there and other facts that he has testified. I think it is proper rebuttal.

Rule 16(a)(1)(C) does not require the disclosure of evidence not intended for use by the government in its case-in-chief when the evidence was not obtained from the defendant or by means of a grand jury subpoena and the defendant has failed to show its materiality to the preparation of his defense. *United States v. Rhoads*, 617 F.2d 1313, 1319 (8th Cir. 1980). Absent an abuse of discretion, we will not disturb a district court's ruling on issues involving discovery under Rule 16. *United States v. Samalot Perez*, 767 F.2d 1, 4 (1st Cir. 1985); *United States v. Balk*, 706 F.2d 1056, 1060 (9th Cir. 1983).

Similarly, the district court did not abuse its discretion in permitting the rebuttal testimony of Dennis Bolton, a printer who testified that he had created the J. Rodriguez invoice for Farmedics at the request of Jose Ferrer. He stated that Ferrer had ordered only a small number of the invoices, paid cash for them, and paid extra money to have the invoices created within a day. As the introduction of the invoice itself was proper rebuttal, Bolton's testimony regarding how the invoice was created was also proper. In view of the wide latitude properly granted to trial judges in determining whether proposed evidence is proper rebuttal, *see, e.g. United States v. Cepeda Penes*, 577 F.2d 754, 760 (1st Cir. 1978); *United States v. Papia*, 560 F.2d 827, 848-49 (7th Cir. 1977), we cannot say the district court abused its discretion in permitting Bolton to testify.

IV.

Thuna would have us find error in the giving of two jury instructions that, he says, impermissibly relieved the government of its burden of proof on the issue of Thuna's state of mind. Relying on *Francis v. Franklin*, 53 U.S.L.W. 4495 (Apr. 29, 1985), Thuna maintains that the instructions

violated Thuna's due process right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). We find little merit to this argument.

In *Francis*, the Supreme Court found unconstitutional a charge instructing the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." *Francis*, 53 U.S.L.W. at 4498. The Court found that the instructions were "cast in the language of command." The jurors, said the Court, "were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." *Id., quoting Sandstrom v. Montana*, 442 U.S. 510, 515 (1979).

The instructions in the present case suffered from no similar disability. In quite standard language, they instructed that the unexplained possession of recently stolen property in a state other than the one from which the property is stolen is ordinarily a circumstance from which the jury may reasonably draw the inference and find, the the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property was stolen and transported it in interstate commerce.[13]

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[13] Specifically, the district court charged as follows:

> [1] Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from

A rebuttable presumption, like the one in *Francis*, requires jurors to come to a certain conclusion unless the defendant presents contrary evidence. These instructions, however, were clearly permissive. The court defined the term "inference," and emphasized to the jury that they were never required to make inferences. It further instructed that the burden of proof beyond a reasonable doubt remains with the government throughout the entire trial, and never shifts to the defendant.

Under such circumstances, the instructions given by the district court did not shift any burden of proof on the issue of state of mind to the defendant. *Accord Barnes v. United States*, 412 U.S. 837, 840-46 (1973) (upholding first instruction); *United States v. Lavoie*, 721 F.2d 407, 409-10 (1st Cir. 1983), *cert. denied*, 465 U.S. 1069 (1984) (upholding first instruction); *United States v. Andrews*, 675 F.2d 962, 964 (8th Cir. 1982) (upholding both instructions); *McAbee v. United States*, 434 F.2d 361, 361-63 (9th Cir. 1970) (upholding both instructions). Where, as here, there was ample evidence for the jury to apply the permissive inferences, we see no reason to disturb the verdict.

Affirmed.

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which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen. . . . Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.

[2] And possession in one state of property recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it, or caused it to be transported.

APPENDIX B

No. 85-1422.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,
Appellee,

v.

MARTIN G. THUNA,
Defendant, Appellant.

Before

CAMPBELL, Chief Judge,

COFFIN, BOWNES, BREYER and TORRUELLA,

Circuit Judges.

ORDER OF COURT

Entered: April 18, 1986

The petition for rehearing in banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court in banc,

It is ordered that the suggestion for rehearing in banc be hereby denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By: /s/ RICHARD W. GORDON
Chief Deputy Clerk.

[cc: Messrs. Tellechea and Pesquera]

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT VI - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 18, UNITED STATES CODE, SECTION 659

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his

possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an

intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 13, 63 Stat. 91; Oct. 14, 1966, Pub.L.89-654, § 1(a)-(d), 80 Stat. 904.

TITLE 18, UNITED STATES CODE, SECTION 2314

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulant intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Publ.L. 90-535, 82 Stat. 885.

TITLE 18, UNITED STATES CODE, SECTION 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdeameanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 18, UNITED STATES CODE, SECTION 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct 31, 1951, c. 655, § 17b, 65 Stat. 717.